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## Article 301 and Turkish Stability

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## ARTICLE 301 AND TURKISH STABILITY

**Elizabeth V. White**

### INTRODUCTION

Since the fall of 2005, more than sixty journalists, academics, intellectuals and even fiction writers have been subject to a rash of charges of “insulting Turkishness” under Article 301 of the Turkish Penal Code. This phenomenon reinforces at the same time it restricts the development of free speech in Turkey at the cusp of a society precariously balanced between EU accession and ultra-nationalist isolationism.

Turkey cannot become a member of the European Union until it reconciles its need to control the actions and words of its populous with its desire to reform and integrate. The following pages are intended to show that the divided and tumultuous political landscape builds blockades on the road to EU accession as fast as they can be knocked down. Turkey is simultaneously making progress and getting nowhere due in part to a fundamental lack of internal cohesion with regards to the requirements and ramifications of free speech as defined by the standards of the EU.

Turkey’s executive branch is at odds with its judicial branch and ultra-nationalist lawyers and does not seem entirely comfortable with the suppression of the press. However, due to a surge in ultra-nationalist voter support for certain judicial decisions, the current AKP controlled government has yet to find a politically sound way to address the matter. Members of Turkey’s free press are repeatedly brought up on charges which are then marginalized on case by case basis, indicating an aversion to dealing with Article 301 directly. Article 301 and the issue of free speech is a deeply polarized issue in Turkey and many Turkish political pundits opine that a strong stance one way or the other on Article 301 will not be presented by the AK party until after the coming elections.

### ARTICLE 301

Article 301 took effect on June 1, 2005, part of a package of penal-law reforms introduced to bring Turkey up to European Union standards and as a precursor to EU

accession negotiations. Article 301 covers the following:

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be punishable by imprisonment of between six months and three years.
2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial institutions of the State, the military or security organizations shall be punishable by imprisonment of between six months and two years.
3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
4. Expressions of thought intended to criticize shall not constitute a crime.

Article 301 is a not a new concept in Turkey. It was designed to replace Article 159, a similar law that was part of the original penal code heavily influenced by Italian Fascism. Other Turkish articles dealt with similar issues. In the 1980s when Turkey's Ozal government was under international pressure to change Articles 141, 142 and 163 (Articles 141 and 142 were designed to "fight communism," and Article 163 targeted people with religious sensitivities) all were scrapped and Article 7 of the Anti-Terrorism Law was created and used in a similar fashion. So, while Article 301 is certainly not the only part of the Turkish Penal Code that has fallen under criticism for curtailing freedom of expression and political criticism or for its circular purpose of creation (i.e., Articles 318, 305, 216, and 7), it was under the wording of Article 301 that the latest surge of charges against intellectuals and journalists was carried out.

### **High Profile Cases**

Prime Minister Recep Tayyip Erdoğan has stated that the European Union was consulted during the creation of Article 301 and had no reservations at that time.<sup>1</sup> Questions and concerns were raised only after the article was used to prosecute some "Armenian personalities" and Turkish Nationals for comments regarding the Armenian Genocide many say took place while the Ottoman Empire was collapsing after World War I.

### **HRANT DINK**

Indeed, one of the first high profile cases of "insulting Turkishness" was against Hrant Dink, editor of the bilingual Turkish-Armenian newspaper *Agos*, who asserted that the dramatic increase in the application of Article 301 had more to do with "Armenianness" than "Turkishness". Dink was charged under Article 301 based on an article in his newspaper regarding relations between Armenians and Turks. The court asserted that the article contained a phrase implying that Turkish blood was "dirty". One argument is that Dink's comment was confusing due to his poor Turkish. A translation of his statement reads, "poison in the Armenian blood related to the fear and hatred of Turks" by which Dink apparently meant that the "fear and hatred" of Turks is a poison in Armenian blood; however, due to the wording many interpreted his words as saying that Turkish blood itself was

poison. Dink himself flatly denied any wrongdoing and repeatedly insisted that the article was intended to improve relations between the two groups. Dink was found guilty and sentenced to six months in prison, despite the Prosecutor General's Office objections based on the fourth clause.<sup>2</sup> The guilty verdict was passed seven to two. In their dissent, the two judges (one of which was the chairman) expressed concern that the verdict reflected a poor understanding of the norms of the EU regarding the right to criticize and boldly stated, "There is still fear for expressing thought of dissent in Turkey. No opinion, which has been tried and sent to jail dies. On the contrary, such opinion finds other supporters. One should know that dissent can not be prevented by creating fear for punishment."<sup>3</sup>

Arant Dink was shot three times in the head on the morning of January 19, 2006, not far from the offices of *Ages*. The gunman, a troubled young man not yet twenty, is said to have yelled, "I shot the non-Muslim!" and then fled the scene. He was later apprehended. Thousands of people marched in Istanbul in protest of his death, some calling Dink a martyr to the cause of the abolishment of Article 301. Turkish officials and international dignitaries alike have expressed deep sorrow for Dink's death.

#### RAGIP ZARAKOLU

Around the same time that Dink was brought up on charges, publisher Ragip Zarakolu was charged under Article 301 for publishing two books, one referring to the mass deportations of Armenians in 1915 carrying a seven and a half year sentence and another entitled *An Armenian Doctor in Turkey* carrying a six year sentence Zarakolu has yet to stand trial for.

#### PERIHAN MAGDEN

A December 2005 newspaper column by Perihan Magden is the basis for another high-profile case. The writer and journalist faced a three year prison sentence for the article which strongly defends the idea of conscientious objection and the refusal to perform military service. Conscientious objection is illegal in Turkey and is punishable by imprisonment, as is any other avoidance of conscription. Magden was acquitted on June 27, 2006 when the court ruled that the opinions expressed in the article were covered by freedom of expression and therefore not a crime.

#### ORHAN PAMUK

In February of 2005 Article 301 vaulted into the international consciousness when, during an interview with the Swiss publication *Das Magazin*, Turkey's renowned author Orhan Pamuk stated, "Thirty thousand Kurds and a million Armenians were killed in these lands and nobody but me dares to talk about it." The backlash that followed forced Pamuk to flee the country. Demonstrations were staged and his books were burned. Charges were brought against him upon his return to Turkey later in 2005.

Because Pamuk was charged under an ex post facto law, approval was required from the Ministry of Justice in order to prosecute. That approval never came. On January 22, 2006 the ministry declared that it had no authority to open a case against Pamuk under the new penal code and thus the charges against Pamuk were dropped. That week the European Union began their review of the Turkish justice system.

Pamuk's most recent novel, *Snow*, addresses the urgent issues of secularism and religion in a country that has been torn between the two for most of the last century. While his



comments to a Swedish newspaper unleashed a slew of charges and threats of death and imprisonment, his acclaimed novel was released without incident. Later, on the BBC's *Hardtalk*, Pamuk indicated that his remarks in *Das Magazin* were intended to draw attention more to the issue of free speech in Turkey than to the massacres themselves.

The prosecution of critics and dissenters has few apparent advantages for Turkey. Indeed, each charge compounded by the dissenting voices within the government itself. In Dink's case, the Prosecutor General's Office pointed out that the fourth clause makes it clear that criticism is not a crime, to no avail. Ragıp Zarakolu's case drags on in the courts, postponement after postponement, serving only to highlight Turkish dissent and bringing into question Turkey's EU compatibility. Perihan Magden faced a harsh three year sentence for an article that was later declared by the courts to be simply a matter of freedom of speech. With Pamuk, the Justice Ministry eventually declared that they had no authority to try him based on Article 301. At the height of media scrutiny was the case of Elif Safak, when the Turkish government deemed necessary prosecution over the remarks of fictional characters.

#### ELIF SAFAK

Safak, as with Pamuk, had the charges against her driven forward by "ultra-nationalist" lawyers, indicating that while the apparent campaign to protect "Turkishness" is not one initiated by the conservative AKP government it is, however, clearly not an issue that the dominant party would rather address. In September 2006 the then heavily pregnant Safak stood trial for only a few minutes before her case was thrown out. In an October 2006 interview on NPR's *All Things Considered*, Safak gave her view that the real target of her trial was not herself but instead Turkey's European Union accession bid. The novel, *The Bastard of Istanbul*, became a bestseller in its Turkish release.

#### Public Reaction

As evidenced above, several of the charges filed under Article 301 of the Turkish Penal Code quickly became high profile media frenzies. In Turkey, Ultra-nationalists were riled by the controversial statements of those on trial. More liberal factions (mainly pro-EU) were outraged by Turkey's willingness to try the cases. Of the latter, there are many who believe, both within Turkey and internationally, that the charges brought forth under Article 301 were not filed in order to protect "Turkishness" or even to stifle dissenting opinions but instead to serve the purposes of the ultra-conservative "old-guard" who have a vested interest in maintaining the status quo and keeping Turkey out of the European Union.<sup>4</sup>

In other cases it seems that politicians view Article 301 as a non-issue; that is, something that is not necessary to gain power and something that has many apparent disadvantages to address. Most government officials attempt to downplay the effects of Article 301, the main defense being that no one has ever been imprisoned under Article 301. "Now we can say 'no' - but there is someone who was shot and who died," Mehmet Tezkan wrote in Vatan newspaper. "Then [the ministers] will be silenced."<sup>5</sup>

While Hrant Dink's death was directly perpetrated by an angry youth, the youth was apparently recruited by Yasin Hayal, a man with an ultra-nationalist agenda who had served eleven years for the bombing of a McDonald's. Another man, a student involved with Alperen organization (a neo-facist group associated with the ultra-nationalist Grand Unity Party [BBP]), was also apprehended and charged with instigating and organizing the murder.

The BBP denies any involvement in the killing. All three men lived in Trabzon, a city known for ultra-nationalist recruitment. Were these men the link, the conductors between a culturally embedded wariness of free speech and an ultra-nationalist sector of the public galvanized against the EU and its implications? And did Dink, a man who shortly before his death wrote in *Agos* that “The memory of my computer is filled with angry, threatening lines...”<sup>6</sup> become a lightening rod for that fury? For many in Turkey, Dink is considered a hero. The hate mail flowing into his inbox is a stark indication of the division Turkey has faced for decades. On one side, ultra-nationalists seethe at the perceived European yoke. On the other, those who support the EU bid race to grow and change Turkey with ever increasing urgency.

Erkan Mumcu, leader of the Motherland Party, indicated his belief that, “Certain circles try to create a Turkish profile of attacking innocent doves.”<sup>7</sup> He called the killing a plot to create a fundamentalist Turkish image. He did not distinctly specify who was behind the plot tarnish Turkey’s image, but he did reference a remark made by Dink inferring that Europeans were the real reason for the friction between Turks and Armenians in addition to alleging nepotism and corruption within the Turkish government.

In the wake of Dink’s death the death threats seemed to have passed on to Pamuk. While being escorted in a courtroom, Yasin Hayal shouted out for Pamuk to “be smart”, implying that if Pamuk was not careful he could suffer the same fate as Dink. Pamuk is now also getting a lot of ultra-nationalist hate mail similar to mail received by Dink. As a precaution, Pamuk is now under close protection (protection that Dink was refused).

Public reaction to the murder has been tremendous. While Dink’s murder is certainly a blow to the outlook of free speech in Turkey, it has also inspired many to exercise free speech to its fullest. Aside from the thousands upon thousands of demonstrators that walk in Dink’s funeral procession holding signs in Kurdish, Turkish and Armenian that read “We are all Armenian. We are all Hrant Dink”, there were also those holding “301 is the murderer” placards. Mainstream newspapers all over Turkey are united in their outrage at Dink’s murder and their condemnation for Article 301. The public pressure to do away with Article 301 is rising. But so is the ultra-nationalist pressure.

### **A301 & EU Accession**

Many Turks view EU accession as a lost cause, irrelevant, and are more concerned that the EU will ban their favorite fast food chain than with education, social security, health issues, etc. Some of Turkey’s populous feels that the EU is treating Turkey unfairly, forcing them to jump through hoops they would not otherwise have to jump through if they were not a Muslim nation, if they were not Turkey. There is strong concern about a European Christian bias towards Turkey, some even saying “Christian Values” is the new accession criteria, especially after the September 22, 2006 comments of Bavarian President Edmund Stoiber (leader of the Christian Social Union Party [SU], which has strong ties with Germany’s ruling Christian Democratic Union). Stoiber proposed that deliberations on Turkey’s accession be ended, citing what he thought to be gross overreaction of Turkish leaders to Pope Benedict’s comments on Islam. He is also quoted as saying, “Turkey is not Europe nor does it belong to the continent, because the country has such great cultural and spiritual differences with western values.”<sup>8</sup> It has been alleged that Germany’s government shares this view but cannot come out in support of it due to diplomatic constraints.

In response, Assoc. Prof. Dr. Sedat Laciner, head of the Ankara-based USAK made

some scathing remarks. "If the EU is only a Christian club, I think Turkey should not be part of it. Because Turkey is a secular country and I am personally against to be part of a Middle Ages understanding." Lacinier goes on to call "Christianity-based Europe" a "narrow-minded organization", and warns that Turkey should stay away from the "discriminative structure and religious fundamentalism" of Europe. He also compared Mr. Stoiber to Osama Bin Laden in "seeding religious hate" and compared Turkey's current position with that of European Jews before World War II. "We want to see a more just and more balanced EU," Mr. Lacinier added. "We want to establish a common future instead of obsessing with the biases of the past."<sup>9</sup>

Turks grow restless at the strain of change and the insistence that, when change occurs, it is not enough. They feel that enough is enough, that there is no hope for accession. These are the sentiments that are feeding the ultra-national surge in Turkey.<sup>10</sup>

The conservative Muslim AK party has struggled to bring Turkey closer to EU accession. In the interest compliance with the Copenhagen political criteria the 1982 Turkish constitution underwent extensive amendment in October 2001 and May 2004 with eight "harmonization packages" passing the Turkish Parliament in the interim. Article 90 of the Turkish constitution was amended per EU recommendations in order to establish the supremacy of international human rights conventions over domestic law. The civilian control over the military was improved during this time as well, putting the budget back in the hands of parliament and allowed closer scrutiny of the Turkish Armed Forces. Spending for education was increased and now exceeds military spending. Many other reforms involving the openness of government procedures and the strengthening of civilian control have also been enacted.

### **A301 Supporters**

The AKP's main opposition, the Kemalist CHP, is against further EU reforms. Their attitude is made it clear in a statement by their deputy Orhan Eraslan, member of the justice commission of Turkish parliament: "301 is not wrong. It should not change. It is not only a need, it is also a necessity. If we want to remain as a nation and state, it should remain."<sup>11</sup>

In addition, Republican People's Party (CHP) leader Deniz Baykal said, "The prime minister is looking for an accomplice to the shameful act of making it free to insult the Turkish identity in Turkey. He almost expects us to apologize for being Turkish. We will not apologize."<sup>12</sup>

The Nationalist Movement Party's (MHP) support of Article 301 has not waived either. Mehmet Nacar, vice secretary-general of the MHP, has asserted that criticisms of Article 301 intentionally disregard the fourth clause ("Expressions of thought intended to criticize shall not constitute a crime.") which Nacar claims is an indication of a hidden agenda to destroy Article 301 in order to degrade Turkishness with impunity.

Sinan Aygün, president of the Ankara Chamber of Commerce, is not only a supporter of Article 301 but has called for a harsher version. Aygün reviewed the article with a group of experts and presented a report to Minister of Justice Cemil Çiçek saying just that.

Çiçek, the architect of Article 301, has been harshly criticized by the media. Many believe that Çiçek is blocking any move to reform Article 301. In his own defense or perhaps the article's, Çiçek has responded that the many critics of Article 301 have failed to read its text. "These people do not know the previous law and the changes in it. They do not realize what kind of implications a change in this article will provoke in this country,"

Çiçek said.<sup>13</sup> Çiçek also said that the text of the law is not so important as how the prosecutors use it or how the judges interpret it. He claims that even if Article 301 was abolished, if prosecutors or judges had “bad intentions” they could simply substitute Article 216 and continue unabated.

Minister of Tourism Atilla Koç, while in supportive of Article 301, does not believe that the problem of Article 301’s vague text is entirely relevant and that the real issue lies in the method of jurisprudence.

Prime Minister Erdoğan is not comfortable with the idea of abolishing Article 301 altogether, nor is he comfortable with the connection of Article 301 to Hrant Dink’s murder. He has asserted that only change in the article could be the increased penalty in the third clause for a Turkish citizen insulting Turkishness in another country.

### **A301 Reform**

At this time a joint proposal for the amendment of Article 301 has been submitted to the Turkish government. It has already met with great criticism; some say it is more of a retreat to Article 159 than an improvement, including Ruling Justice and Development (AK) Party deputy leader Dengir Mir Mehmet Fırat who called the proposal a “throwback” in terms of mentality.<sup>14</sup> Economic Development Foundation (IKV) head Davut Okutcu, spokesperson for the group, denies this accusation. The proposal retained the notion of “Turkishness” but replaced “insulting” with “derision or ‘hurling invective’”. It also included reduced penalties for the offense and puts special emphasis on the verdicts of the European Court of Human Rights (ECHR) and defines “Turkishness” under Article 66 of the Constitution, which defines “Turkishness” as people who are tied to the Turkish Republic with a bond of citizenship are called Turks.<sup>15</sup> The proposal is mainly criticized for its failure to bring clear legal definition to an infamously manipulated article.

The proposal was prepared by IKV, Turkish Union of Chambers and Commodities Exchanges (TOBB), Turkish Industrialists’ and Businessmen’s Association (TUSIAD), Independent Industrialists and Businessmen Association (MUSIAD), Turkish Confederation of Employers’ Unions (TISK), Confederation of Turkish Trade Unions (Turk-İs), Labor Confederation (Hak-İs), Civil Servant Unions Confederation (Memur-Sen), Turkish Broadcasters Association (TVYD) and Turkish Union of Agricultural Chambers (TZOB). Of the twelve participants, the Revolutionary Workers’ Labor Union (DISK) and the Turkish Doctors Union (TTB) disapproved of the outcome, saying that the law should be struck down altogether. Justice Minister Cemil Çiçek himself was critical of the proposal, accusing those involved of overlooking his call to work on a concrete proposal.

In response to the proposal, Turkish Solidarity Council Spokesperson Mustafa Erkal, held a joint press conference in support of the current article. The Turkish Solidarity Council is made of nearly 100 civil groups invested in the preservation of Article 301. Others expressed outrage that supporters of the article are being depicted as having encouraged the murder of Hrant Dink and accused the European Union of having double standards, referencing similar laws on European books. Ankara Chamber of Commerce (ATO) Chair Sinan Aygün pointed out that the article protects those who want to annul it.

Largely ignored by the Turkish and the international press alike is the issue of the fourth clause of Article 301. The fourth clause is utilized almost arbitrarily and while it should have a serious impact of the interpretation of the law, judges, prosecutors and the press often ignore it in their discussions. Obviously, those in support of Article 301 most

commonly mention it, but they too do not spend too much time analyzing the benign clause. The fact that within the controversial Article there is a clause protecting "expressions of thought intended to criticize" should be a good indication of Turkey's progress but in practice it ends up as a red herring.

### **THE EUROPEAN UNION**

Article 301 is definitely of great concern to the EU with regards to Turkey's accession. A report issued from the Commission to the European Parliament and Council in regards to the enlargement process announces that, "It is necessary to ensure freedom of expression without delay by repealing or amending Article 301 of the Penal Code and by overall bringing the legislation into line with European standards."<sup>16</sup> Article 301 is seen to be in violation of the Copenhagen Criteria, mainly regarding "human rights and respect for and protection of minorities".

The EU trusts Turkey to solve its internal free speech issues. Beyond the amendment or repealing of Article 301, there is not much in the progression of free speech in Turkey that the EU feels it can (or indeed, is required to) effect.

### **Similar EU Laws**

There is criticism of the EU within Turkey regarding their strong stance against Article 301. EU critics and supporters of the article point out that many European Countries have similar laws. For example, German articles 90, 90a and 90b penalize such acts as insulting or maliciously maligning Germany or one of its lands or constitutional order, disparagement of Germany's colors, flag, coat of arms or anthem and anti-constitutional disparagement of its constitutional organs. Punishments for the German articles are harsher than in Article 301 and as of the middle of 2006, there were 72 sentences resulting from these articles.

Italy has 290, 291 and 292 of the Italian Penal Code regards degradation, insulting and disparagement of the republic, constitutional institutions, military forces, flag and other state symbols and the Italian nation as punishable crimes. There were 21 convictions in 2000, 31 in 2001, 22 in 2002, five in 2003 and 28 in 2004.

A total of 134 "criminals of degradation" were convicted under the Dutch Penal Code in 2004, 146 in 2005 and 139 in 2006 of crimes similar to those described in Article 301. The Polish, Spanish, French and Austrian penal codes have similar articles. The Danish Penal Code includes EU nations, countries and the EU Parliament into the list of legally "indemnified" entities.<sup>17</sup>

However, European concerns stems mainly from the application of the law. Prime Minister Erdoğan himself has noted that the European Union did not disapprove of the creation of Article 301. Only after Article 301 was so prolifically applied did the EU raise any objections. Also, it should be noted that while Turkey treats Article 301 as a criminal offense, most of the articles described above are treated as civil offenses.

### **Calls For Change**

European Parliament member Joost Lagendijk sent a letter to both Prime Minister Erdoğan and main opposition leader Deniz Baykal asking them to immediately change Article 301. Within the letter Lagendijk allowed that many EU countries, including his own country, the Netherlands, had laws similar to Article 301. However, he also pointed out the



differences in these laws. “First there is the word ‘Turkishness’ in the first paragraph of Article 301. ... The second point concerns the reasoning behind the article. ... It should serve the orderly functioning of the public service,” explained Lagendijk.<sup>18</sup> None of the high-profile Turkish cases, he went on, served this function.

Chief EU negotiator Ali Babacan asserts that Article 301 is not really the problem but instead an element of the Turkish mentality that allows laws such as Article 301 to be used in a negative fashion. “Lifting or changing Article 301 of the Turkish Penal Code will not change a great deal so long as the players concerned do not change their mentality. They will simply find other articles of the Turkish Penal Code to put to use in the same way.” Babacan added, “We are attempting to realize a new philosophy with old players. This simply will not work.”<sup>19</sup>

### **Progress Reports**

A report issued on October 5, 2003 by Arie Oostlander, Christian Democratic MP to the European Parliament regarding Turkey’s progress towards meeting the Copenhagen Criteria (officially called “2003 Regular Report on Turkey’s Progress Towards Accession”) recognized and cataloged Turkey’s progress as well as addressed issues that still required further reform (or in some cases, any reform at all).

The report focused on the political system, the judiciary, the role of the military, the status of religious minorities and their property rights as well as Turkey’s non-compliance with several decisions of the European Court of Human Rights. Among some of the major concerns of the report were regarding Turkey’s “authoritarian philosophies”. Much of the Turkish Penal Code reflects the influence of Italian Fascism of the 1930s and of particular concern in the report was the 1982 Turkish constitution which gives the National Security Council (NSC) a wide breadth of powers incompatible with a civilian democracy. The report cites NSC’s role in the Council of Higher Education (YOK) and the Council of Radio and Television (RTUK) among others extensions of military powers into civilian life without sufficient oversight that must be limited (the report also cites various amendments from previous “reform packages” that worked towards this goal, such as abolishing extended powers of the NSC, limiting access to civilian agencies and increased fiscal transparency). Also emphasized was the need for Turkey to transfer power from NSC dominated organizations to civil society associations and encouragement of social dialogue and trade unions.

Mr. Oostlander’s report raised concerns regarding Article 27 of the Covenant of Civil and Political Rights (granting ethnic, religious, and linguistic minorities the right to pursue their culture, religion and language). Agreement to such an article is controversial in Turkey largely due to the roughly 15 million Kurds living in the country. Turkey also has laws restricting certain property rights and religious training of Catholic and Protestant churches.

Regarding the Turkish Penal Code, Articles 312, 169 and 7 (dealing with provocation and threats to “public security” resulting from the advocacy of class, ethnic, religious, linguistic, and racial divisions) were singled out as being used to intimidate, prosecute and condemn many Turkish intellectuals and politicians to prison sentences. Concerns regarding the impartiality and consistency of judges as well as the lack of proper oversight of prison administrators (and therefore a lack of proper evaluation of complaints regarding the treatment of prisoners) were also presented in the report.

The report mentions that Article 159 (Article 301’s predecessor, “insulting the state

and state institutions and threats to the indivisible unity of the Turkish Republic”) had been reformed in 2002, reducing the minimum sentence from one year to six months and including exceptions for expressions of opinion intended only to criticize, and not intended to “insult” and “deride” these institutions. However, it also warns that:

...as announced by the Turkish government, the process of reviewing existing legal restrictions in this area has yet to be completed. In a report assessing the 3 November 2002 elections, the OSCE/ODIHR concluded that the broader legal framework and its implementation establish strict limits on the scope of political debate in Turkey. Non-violent expression of political views beyond these limits is still restricted by a variety of laws and is rigorously enforced.<sup>20</sup>

The report goes on to explain how Turkish prosecutors have a tendency to use alternative provisions of the Penal Code (Articles 312 and 169) and the Anti-Terror Law (Article 7) to limit freedom of expression, hinder the freedom of the press (confiscation of press equipment, heavy fines on publishers and internet censorship) as well as to prosecute those who had been acquitted based on the reforms. The report calls for a more consistent and systematic approach to address these issues and all future amended legislation.

The report also leaves no question that Article 90 must be altered to establish the primacy of international law over national law, a critical step to becoming part of the European Union. Mr. Oostlander made it clear in his report that Turkey had work to do before it would meet the Copenhagen Criteria, but clearly stated that “Turkey is able, if it wishes and if it considers it to be in its interest, to transform itself into a first-class EU state.”

In its “Presidency Conclusions” on December 16 and 17, 2004, the European Council praised Turkey for its progress and stated that Turkey had sufficiently fulfilled the Copenhagen political criteria enough to open accession negotiations provided it adhered to the recommended reforms. The “Conclusions” made no specific mention of Article 159 (or Article 301, as it did not yet exist).

A report issued November 8, 2006 by Olli Rehn echoed these same concerns, indicating that progress in Turkey has been slow. The outlook of the report was on the positive side. In regards to Article 301, Rehn said:

We state clearly in our report that further reforms are needed, in particular to ensure the freedom of expression. There is an open and intense debate going on in the Turkish civil society on the notorious article 301, calling for its amendment. Prime Minister Erdogan has invited civil society organisations to propose amendments to the Penal Code, which is a welcome initiative. We expect words to lead to deeds, soon.<sup>21</sup>

Also in the report Rehn indicates that the best way to deal with Turkey is to be “firm but fair”. This is a subtle indication that the EU has no intention of budging on their requirements, no do they have any inclination to let Turkey into the European Union (at least not any time soon).

## CONCLUSION

To date, Turkey has failed to initiate all of the reforms advised by the Oostlander Report, most notably the drafting of a new “civilian constitution” (as opposed to Turkey’s current “authoritarian” constitution, established in 1982 after a military coup). Reforms



have been made, such as extensive constitutional amendments geared at meeting the Copenhagen Criteria and the establishment of the supremacy of international human rights conventions over domestic law. However, severe authoritarian elements remain, threatening free speech in its Turkish infancy. The turbulence of the past century and influence of authoritarian and fascist have long mired Turkey in an ideology of safety over freedoms, exemplified in Orhan Erasm remarks on Article 301.

The AK party has long been a staunch supporter of reform, striving to meet the requirements of the EU and to elevate their country to the global scale. Why then would that same government allow such high-profile campaign against free speech? After all the hard work they've done, after all the progress they've made, why block the path they themselves laid? The AKP's current diplomatic/political stance on Article 301 is wait-and-see. It is clear, though, that as Turkey nears election time, politicians are less and less inclined to address the issue. As described in the above pages, Turkey is divided on a gradient line between freedom of expression, nationalism, Europe, integration and the shards of the Ottoman Empire left behind. The polarization in Turkey is palpable, in a country where instability has been a persistent bedfellow, so after so many years of political turmoil and military coups it is understandable why so many would be willing to risk it – even at the cost of personal freedoms. The nationalist movement constantly challenges the government to curtail free speech and go against the European Union's criteria just as the pro-EU factions demand that more progress be made towards accession.

It is clear that the nationalist movement is the driving force behind Article 301 and its counterparts. Who or what faction serves to gain from hindering Turkey's efforts to accommodate the EU's requirements? There is a mentality in Turkey (not necessarily shared by all Turks, but largely prevalent) of hard-won national pride. Anyone serving to diminish that pride is not only insulting Turkey but any individual who is proud to call themselves a Turk. Ultra-nationalist factions use this sentiment to gain a stronger grip on society and attempt to pull Turkey into a reactionary landslide. It is not so much that Turks do not understand free speech as the ultra-nationalists do not trust it and see it as a tool of "enemies of the state"; Turkey's prevailing government, on the other hand, either cannot or does not know how to balance their desire to become a national economy with a respected presence in the EU with the extremely powerful ultra-nationalist factions that seek to thwart it. Turkey may be somewhat behind on the accession requirements of the European Union but it would be a poor assessment to underestimate them. The Turkish are cognizant of free speech, they just don't have much experience with what it can do. Fear of the unknown coupled with the memory of disastrous political instability create a situation where exploring the parameters and ramifications of free speech cause public outcry and reactionary elements to surface. In Turkey, a country who not long ago was ruled by emperors and dictators, freedom of speech will be a slow and painful process. It is clear that there is a drive within Turkey to join its Western neighbors and break free of the stigmas of the Middle East, but there are too few who want this at the cost of becoming Western. It is a tangled struggle through which Turkey must emerge whole if it ever hopes to achieve accession. But how Western can Turkey become before they split apart?

#### END NOTES

1. "Behold! The number of evil is still 666, not 301", Sunday's Zaman. January 28, 2007. <<http://www.sundayszaman.com/sunday/detaylar.do?load=detay&link=88>>.

2. In reaction to France's legislation making it illegal to deny the Armenian genocide, Dink reportedly said, "If this bill is adopted, I will go to France and, in spite of my conviction, I will say it was not genocide. The two countries can then compete to see who throws me in jail first." ("Turkey's Armenians distrust French genocide bill". October 10, 2006 < <http://www.turkishpress.com/news.asp?id=146077>>)

3. "Turkey's Chronic Headache", *The New Anatolian*. September 22, 2006. <<http://www.thenewanatolian.com/opinion-15059.html>>.

4. "Schism: Free Speech vs. 'Insulting Turkishness'" By Ivan Watson All Things Considered KCLU, Thousand Oaks 4 October 2006

5. "Killing of Dink shocks Turkey" BBC News. January 22, 2007 <<http://news.bbc.co.uk/2/hi/europe/6288419.stm>>

6. "Hrant Dink's final article" BBC News. January 20, 2007 <<http://news.bbc.co.uk/2/hi/europe/6283461.stm>>

7. "Man linked to Dink murder threatens Nobel-winning author" *The New Anatolian*. January 25, 2007 <<http://www.thenewanatolian.com/tna-21811.html>>

8. "Christian Values: New EU Membership Criteria for Turkey?" *Turkish Weekly*. September 23, 2006 <<http://www.turkishweekly.net/news.php?id=38880>>

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10. Baydar, Yavuz "Turkey's chronic headache" *The New Anatolian* 22 September 2006 4 December 2006 <<http://www.thenewanatolian.com/opinion-15059.html>>

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12. "The regrettable story of Article 301" *Turkish Daily News*. January 25, 2007 <<http://www.turkishdailynews.com.tr/article.php?enewsid=64711>>

13. "Behold! The number of evil is still 666, not 301", *Sunday's Zaman*. January 28, 2007. <<http://www.sundayszaman.com/sunday/detaylar.do?load=detay&link=88>>.

14. Several AK Party members, including the premier himself, stood trial under Article 159. Erdogan, then mayor of Istanbul, was given a six-month sentence for reciting a poem on charges of provoking the public.

15. The controversy from the definition of "Turkishness" stems from the common use of legislative intent in interpreting Article 301, which defines the term Turkishness as "one would understand the common entity created by the shared culture unique to the Turks, wherever they are living in the world. This entity is broader than the term "Turkish Nation" and also contains the peoples sharing the same culture outside Turkey." Critics have labeled "shared culture unique to the Turks" as racist.

16. "Enlargement Strategy and Main Challenges 2006-2007" November, 8 2006 <[http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/com\\_649\\_strategy\\_paper\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf)>

17. "Behold! The number of evil is still 666, not 301", *Sunday's Zaman*. January 28, 2007. <<http://www.sundayszaman.com/sunday/detaylar.do?load=detay&link=88>>.

18. "Amend 301; Will it work?" *Sunday's Zaman*. February 4, 2007 <<http://www.sundayszaman.com/sunday/detaylar.do?load=detay&link=139>>

19. "If there is no change in mentality, lifting article 301 will make no difference" *Hürriyet Internet*. February 17, 2006 <<http://www.hurriyet.com.tr/english/5974955.asp?gid=74>>

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